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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 114

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GRACE MARSH,

*Appellant,*

*vs.*

THE STATE OF ALABAMA,

*Appellee*

---

## BRIEF FOR APPELLEE

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## BRIEF FOR APPELLEE

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### Official Report of Case in Court Below

This case has not been officially published but opinion and decision of the Court of Appeals is published in 21 So. 2d. 558, 563, and certiorari denied by the Supreme Court of Alabama in 21 So. 2d. 564. The opinion of the Court of Appeals may also be found in the record in this case (R. 140-152).

### Statement of Case

This case was set in motion by an affidavit which was as follows:

"THE STATE OF ALABAMA,
County of Mobile:

Personally appeared before me, Wm. J. Kern, Clerk of the Inferior Criminal Court of Mobile County, A. I. Chatham who, on being sworn, deposes and says that

he has probable cause for believing and does believe, that within the past 12 months Grace Marsh without legal cause or good excuse and after having been warned within the past six months not to do so, entered upon the premises of the Gulf Shipbuilding Corporation, a corporation contrary to law and against the peace and dignity of the State of Alabama, and prays for a warrant for the arrest of the said Grace Marsh.

A. I. CHATHAM.

"Sworn to and subscribed before me this 27 day of December, 1943.

W. J. KERN,
*Clerk of the Inferior Criminal Court of Mobile County*" (R. 1).

The affiant was an employee of the Gulf Shipbuilding Corporation, acting within the line of his duties (R. 11-12).

A warrant of arrest was duly issued on the affidavit, made returnable to the Judge of the Inferior Criminal Court of Mobile County, and duly executed, and judgment of conviction rendered (R. 1-2). From the judgment an appeal was taken to the Circuit Court of Mobile County, wherein it was tried by the Judge without a jury and judgment of conviction rendered. From this judgment the defendant prayed an appeal and under the law it was heard by the Court of Appeals of the State of Alabama.

The sole basis for the affidavit and charge against the defendant in the court below was for a violation of Title 14, Section 426 of the Code of Alabama 1940, the material part of which is as follows:

"Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; * * * shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to

hard labor for the county, for not more than three months."

This statute clearly shows that its purpose is aimed solely at the protection of private property and the owners thereof against trespass thereon by any person after being warned not to do so.

The record shows without dispute that the place where the appellant was alleged to have been trespassing was on the property of the Gulf Shipbuilding Corporation and under its control (R. 34-42, 32-33). The appellant's brief, in legal effect, admits these facts when it says: "Grace Marsh has the right to use the sidewalk and street of the business block in Chickasaw, Alabama, for the purpose of distributing Bible literature regardless of the private ownership and title vested in the Gulf Shipbuilding Corporation" (Brief of Appellant, page 26).

This is the central thought and theory of appellant in this Court and was in the court below—a right to go on private property although the owner objects, so long as she is propagating her religious beliefs. This was appellant's point of view when she called on Peebles to explain her rights by saying:

> "Yes sir, I reminded him we were Ordained Ministers and that was the right granted to us by the Constitution; we were commanded by Almighty God to do this and we couldn't ask man for permits to do this work; we were not peddlers and we were not soliciting for anything, we were simply there carrying on our Christian educational work in an orderly manner" (R. 64).

This statement was made by the appellant after she had been warned not to come upon the property for the purpose of solicitation or doing the works of the Almighty.

> "Q. And when they came in they told you they wanted to go ahead with that work?

"A. I don't know; I know what the substance of the conversation was but not everything said.

"Q. Just what was the substance of the conversation?

"A. They had been warned by our policemen not to come back there and were threatened with arrest and they came back to see me or sent me word, and they came in and we sat there and talked.

"Q. In that conversation didn't they tell you that they were Jehovah Witnesses?

"A. Oh! yes.

"Q. And that they were Ordained Ministers?

"A. Yes sir.

"Q. And that they were distributing these booklets in the furtherance of their religious belief and as they believed in accordance with the directions of Jehovah?

"A. I can't answer that, what all they told me; I didn't have much chance to talk; they told what they were going to do.

"Q. They did tell you the felt that it was a matter of their (fol. 59) religion, they were required to distribute these booklets?

"A. I don't know whether they told me that or not, but they told me they were going to do it and regardless, and I told them they weren't, and that is how it started" (R. 58).

Appellant's brief again announces the same doctrine under the heading "Questions presented numbered 2 and 3" (Appellant's brief, pages 10-11).

Prior to the arrest of appellant a representative of the Gulf Shipbuilding Corporation tried to get appellant to leave the premises and she would not (R. 12, 14).

The record shows that following (R. 49):

"NOTICE

"This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.

"Gulf Shipbuilding Corporation,
Housing Division."

This notice was posted on several windows on different parts of the "Business Block" (R. 19, 22, and 47). Permits were also required to sell newspapers (R. 30, at top of page 48).

The property here involved belonged to the Tennessee Land Company in 1918, and it continued to own the property until sold to the Chickasaw Development Company (R. 82, 85) which is alleged to have covered a period of twenty-three years (Appellant's brief, page 12, last paragraph).

While owned by the Tennessee Land Company it maintained control of all of this property and required permits throughout the whole time it was in charge thereof (R. 87), and maintained peace officers charged with patrolling or policing the grounds (R. 89). Nowhere in the record is it denied that the various owners of this property since 1918 required permits from the owners to enter thereon.

The "Business Block" was constructed by the Tennessee Land Company in 1921 (R. 82-83). This business block parallelled the Craft Highway and is separated from it by a strip of land thirty feet wide, which is owned by the Gulf Shipbuilding Corporation (R. 44-45). The sidewalk runs only in front of the business property the width of the building, which is about two hundred and fifty feet (R. 45).

The sidewalk is built on the Shipbuilding Corporation's property (R. 46). All the stores on this block are leased to private individuals or companies (R. 56). It is not denied that the Gulf Shipbuilding Corporation or its predecessor in title and possession constructed the sidewalks and roads here involved.

In view of the undisputed facts here stated the controlling question on this record comes to this, Was the place where the appellant was distributing the religious literature one where she had a right to be under the objections of anyone?

Stated another way, Was the place a public way or place within the meaning of the law or was it a private way or place?

If it was such a public place or way, then with some exceptions, not here involved, the First and Fourteenth Amendments to the Federal Constitution protected the appellant. If it was a private way or place then appellant stands defenseless. We may suggest that evidence was offered on these questions as shown by the record, noted above. The trial court, acting in the capacity of a jury, heard this evidence and found that the way or place was a private one. That is necessarily the effect of the judgment of conviction because the defendant was being tried for trespass upon private property. If the record shows there is any evidence that reasonably sustains the finding of the court on these questions the matter is beyond the reach of this Court.

The appellant's chief reliance, if not the sole one, rests upon the First and Fourteenth Amendments to the Constitution of the United States. And our reply to this is that these constitutional provisions deal solely with action by governmental or state action such as by its legislature in the enactment of laws or the acts of its officers in the construction and administration of the law.

The record directly or indirectly raises a number of legal principles, which we will now state and consider.

## ARGUMENT

PROPOSITION OF LAW ONE.

**The First and Fourteenth Amendments to the Constitution of the United States, by their language, are limited to Federal and State action by way of forbidding the passage of any law affecting the establishment of religion or prohibiting the free exercise thereof and forbidding Federal or State agencies acting under color of office to construe any law so as to make it forbid or restrict the free exercise of religion.**

*Virginia* v. *Rives*, 100 U. S. 313, 318;
*Ex Parte Virginia*, 100 U. S. 346;
*Home Telephone Company* v. *Los Angeles*, 227 U. S. 278, 289-291.

This principle is so universally accepted by this Court and other courts that it would seem unnecessary to cite authorities or present argument. We are led to make further statement by the apparent misconception of appellant of the limitations of the principle.

As evidence of the misconception we notice a few contentions of appellant set forth in her brief. Under Point "Five" of appellant's brief it is stated that the refusal to permit preaching and the making of regulations by private persons on the property of such persons breaches the appellant's right of free speech and worship contrary to the United States Constitution (Appellant's brief, 33).

Following up this statement appellant declares "The use of these regulations * * * by both managers amounts to an out-right prohibition of the activities of Jehovah's witnesses" (Appellant's brief, 36).

It is contended by appellant that if appellee's position be sustained "private property confers the right to censor

and prohibit the exercise of civil rights thereunder.'" It is then suggested that a formidable weapon would be designed to defeat the purpose of the Constitution (Appellant's brief, 40). The appellant closes these remarkable statements by saying: "If ownership of property is the criterion by which the right to censor and prohibit the right of freedom of speech, press and worship of Almighty God is allowed then there is a probability that large portions of the State or city could be bought up by a private concern and thus the Bill of Rights defeated within those areas." The appellant treats the notice not to trespass upon the property as a regulation made by the owners (Appellant's brief, 16-17), whereas it was proper evidence on one of the ingredients of the crime of trespass after warning, as well as proper evidence on the question of whether or not the place was a public one by prescription.

PROPOSITION OF LAW TWO

**These Constitutional provisions have other limitations. They are not to be so construed as to prohibit the passage of a law by the State under its police power, appropriately designed to reach and punish evils or to protect the property or persons of the citizens.**

*Sara Price* v. *Mass.*, 321 U. S. 158;
*Reynolds* v. *U. S.*, 98 U. S. 145, 161-167;
*Tiedman's Lim. Pol. Pow.*, page 171, Sec. 74;
*State and Federal Control, Second Tiedman*, page 205, Sec. 66.

This proposition of law may well be considered in connection with Proposition Three immediately following.

PROPOSITION OF LAW THREE

**The Statute of the State of Alabama, Title 14, Section 426, of the Code of Alabama of 1940 (the Statute here involved) making it a crime for any person to enter upon the premises of another after having been warned within six months preceding not to do so, is a due exercise of the State's police powers and is not violative of the First and Fourteenth Amendments of the Constitution of the United States.**

The authorities cited to Proposition of Law Two, *supra*, fully support this proposition. We will not burden the Court by making quotations therefrom. There is nothing in the plain language of the statute that authorizes the conclusion that it is intended to or does interfere with freedom of religion. Nor is it open to any sensible construction that would authorize its application so as to infringe these constitutional guarantees. Very clearly its sole purpose is to protect the freedom of the person and property of the citizen against trespass. The statute is careful to provide that there is no violation of these rights unless the trespassing party has notice or warning not to do so. The constituent elements of the statute are that there must be a trespass on private property without a lawful excuse by a person after he has been warned not to do so. This is the crime. No effort is made to deny or infringe upon or punish for religious beliefs. The statute is not dealing with and punishing parties for propagating any religious beliefs, but rather punishing the unlawful act of entering upon private property after warning not to do so. These views are fully sustained by the decisions of this Court, a few of which will now be noticed, in addition to the authorities cited under Proposition Two, *supra*.

In *Murdock* v. *Penn.*, 319 U. S. 104, the Court had under consideration a municipal ordinance (this being within the meaning of the Constitutional state action) requiring a license to solicit orders for merchandize, etc. While the Court held the ordinance violates the First and Fourteenth Amendments to the Constitution of the United States, it was careful to point out that these constitutional provisions do not protect persons from crimes; and that "Jehovah Witnesses are not above the law" (p. 116).

In *Martin* v. *Struthers*, 319 U. S. 141, the Court had under review a municipal ordinance prohibiting any person to knock on doors, ring dor bells to summon to the door the occupants for the purpose of distributing to them handbills. The Court held that the ordinance was open to a fair construction that it interfered with parties engaged in propagating their religious belief and held the ordinance invalid. The Court, however, made this significant observation, "Traditionally the American law punishes persons who enter into the property of another after having been warned by the owner to keep off" (p. 147).

This Court has consistently held that the constitutional provisions guaranteeing free speech and freedom of religion are not absolute, and that it does not place the activities of those propagating their religious beliefs beyond the reach of the state statutes passed in the due exercise of their police powers making certain acts of persons punishable as a crime.

The case at bar is not the only instance where extreme advocates have pressed the guarantee to the border line of the domain of absurdity. The case of *Chaplinsky* v. *N. H.*, 315 U. S. 568, is a striking example where one of Jehovah's Witnesses was convicted on a charge of violating a statute of New Hampshire making it a crime for any person to address any offensive, derisive or annoying words to another person who is lawfully in any street or public place.

The defendant, as a defense, claimed that at the time of using the language he was or had been preaching the true facts of the Bible and, therefore, was protected by the freedom of religion clause of the Constitution. This Court replied to this defense as follows: "We cannot conceive that cursing a public officer is the exercise of religion in any sense. But even if the activities of the appellant which preceded the incident could be viewed as religious in character and therefore entitled to the protection of the Fourteenth Amendment, they could not clothe him with immunity from the legal consequences of comitant acts committed in violation of valid criminal statute" (p. 571).

In the case of *Nuxbom* v. *City of Riverside*, 29 Fed. Supp. 3, the Court was passing upon the validity of another ordinance prohibiting the distribution in the yards or grounds of any house, porch, etc. without having obtained permission of the owner. The Court delivered a very learned and carefully prepared opinion, in which it discussed the origin and general principles of freedom of speech. Some of the most pertinent facts cover pages 6-7. We quote a few extracts.

> "The right to speak freely does not imply the right to force one's speech on another's private premises" (p. 6).
>
> "In like manner the right to distribute literature and pamphlets does not imply the right to force acceptance by placing them on another person's premises without his permission" (pp. 6-7).
>
> "Nor is any constitutional norm violated when he who would spread literature on private premises is compelled to obtain the owner's consent. A man's home is still his castle. If, to paraphrase Chatham, the King is not free to enter the humblest cottage without being guilty of trespass, what 'Divinity doth hedge the purveyor of handbills that he should be free to enter'" (p. 7).

The Court then said:

> "Yet that is exactly what the plaintiff here claims. He engages in the business of distributing advertising or other leaflets for hire. Under the claim of freedom of the press he would have us confer upon him the right to invade the property of others in the conduct of his business" (p. 7).

The Constitution in guaranteeing religious beliefs does not relieve the individual from obedience to a general law not aimed at the prevention and regulation of religious beliefs.

*Minerville* v. *Gobitis*, 310 U. S. 586, 594-5.

Judge Cooley in discussing the constitutional provisions guaranteeing religious freedom recognizes that the provisions are not absolute and uses substantially this language. No one can stretch his liberty so as to interfere with that of his neighbor, or violate police regulations or penal laws of the land enacted for the good order and general welfare of all the people.—*2nd Cooley, Constitutional Limitations* (8th Ed.) pp. 968-969.

PROPOSITION OF LAW FOUR

**The Alabama Statute on trespass after warning creates a new offense, and it is explicit and complete, leaving nothing in doubt or uncertainty as to what conduct will render a trespasser liable to its penalties. Under this statute a person before entering has full knowledge that it is criminal to do so.**

*Connelly* v. *General Construction Company*, 269 U. S. 385, 391-393.

*Toger* v. *U. S.*, 52 Fed. 917, 919-920.

The appellant has made an alternative effort to show that the place where she was distributing the religious literature

was a public street or sidewalk. To meet and answer this contention we state the following propositions of law.

PROPOSITION OF LAW FIVE

**A public highway or place must be established in a regular proceeding for the purpose or by evidence showing that it was generally used by the public continuously and uninterruptedly or by dedication of the owner of the soil and acceptance by the proper authorities.**

*District of Columbia* v. *Roberson*, 180 U. S. 92;
*Belle View Cemetery* v. *McEvers*, 174 Ala. 457, 461.

PROPOSITION OF LAW SIX

**To constitute dedication by prescription the roadway or place must be an open, defined roadway or place in continuous use by the public without let or hindrance for a period of twenty years.**

*Irwin* v. *Dixon*, 9 How. 10, 30-33.
*Central of Georgia Railroad Company* v. *Faulkner*, 217 Ala. 82-84;
16 *Am. Juris.* (Dedication), Sec. 46;
26 *C. J. S.* (Dedication), Sec. 11.

PROPOSITION OF LAW SEVEN

**To establish such a dedication the clearest intention on the part of the owner must be shown. And the burden rests on the party (appellant here) claiming a right to the use thereof. To discharge this burden the evidence must be clear and cogent. The acts of the owner relied upon to establish dedication must be convincing of an intent to dedicate the property to public use and such acts must be unequivocal to the intention to create a public right exclusive of rights of the owner.**

*Town of Leeds* v. *Sharpe*, 218 Ala. 403, 405;
*Locklin* v. *Tucker*, 208 Ala. 155;
*Irwin* v. *Dixon*, 9 How. 10, 30-33.

PROPOSITION OF LAW EIGHT

**In case of doubt or uncertainty as to the character of use of roadway or place it will be presumed that the use thereof was a permissive one.**

*Bellevue Cemetery Company* v. *McEvers*, 168 Ala. 535.

Propositions of Law Five–Eight may be considered together.

There is no evidence or claim in the record or brief in this case that there was ever any establishment of the sidewalk or street referred to in this case by any legal proceedings looking to that end, nor is there any evidence or claim that the State, county, or any municipal corporation ever made any effort to set apart this sidewalk or street for the use of the public, nor is there any evidence that the owners of the property ever platted the property showing the likely use of any streets or sidewalks or prepared and filed any maps covering this property or that it sold

or offered for sale any lands or lots with reference to this sidewalk or street on this property. Under this state of the record and case we must look elsewhere for evidence to show this sidewalk or street had been legally established for use by the general public. Under the authorities cited, *supra*, this may and must be done by finding in the record evidence that clearly shows an intention on the part of the owners to dedicate the sidewalk and street to the general use of the public and this must be done by evidence showing they have been generally used by the public continuously and uninterruptedly as such without let or hindrance for a period of twenty years. The burden is on the appellant to establish each and all of these essential elements by evidence that is clear and cogent, and the acts of the owners relied upon to establish the dedication must be convincing of an intention to dedicate the sidewalk and street on the land to public use and the acts must be unequivocal to the intention *to create a public right exclusive of the rights of the owners.* If there is any doubt or uncertainty as to the *character* or use of the sidewalk or street the law steps in and says that it will be presumed that the use was *permissive.*

When these settled principles of law are applied to the facts shown by the record in this case the conclusion must follow that this sidewalk and street had never been dedicated in any manner to the use of the general public within the meaning of the law. On the trial below there was some evidence of the use of the sidewalk and street by the public (R. 24, 25, 74 and 80). We have recited this evidence in our "Statement of the Case" and will not burden the Court by its repetition. However, when it is considered as a whole it is, at best, very inconclusive and falls far short of the requirements of the law as set forth in these Propositions of Law (Five–Eight), *supra.*

The record presents the legal question that the sidewalk and street were merely a way of necessity. This question will be discussed later under that title. When viewed in that light it becomes clear that the use of the sidewalk and street is controlled by this state principle of law. In any event the contention that the sidewalk and street were public ways devoted to the use of the general public is completely and conclusively met by the evidence in this record.

The record shows that the property here involved belonged to the Tennessee Land Company from 1918 until sold to the Chickasaw Development Company (R. 82, 85), and that while so owned the company maintained control of all of the property in its entirety on which the sidewalk and street were located and required permits to enter upon the lands throughout the whole time it was in charge of it (R. 87); and it maintained peace officers charged with patrolling or policing the grounds (R. 89). The appellant admits that the Tennessee Land Company was in control for twenty-three years (Appellant's Brief, page 12).

The appellant was told by the Superintendent of the Gulf Shipbuilding Corporation prior to this arrest not to come on the property (R. 48), and the Corporation had posted a notice on the property that the property was private and that without permission no street or house vendor, agent or solicitor of any kind would be permitted (R. 49). The record fails to deny in any manner whatever that during all the period of time here involved that permission to enter for such purposes must be had.

PROPOSITION OF LAW NINE

**The alleged sidewalk and street were not public highways but were ways of necessity created by operation of law for the use and benefit of tenants of the Gulf Shipbuilding Corporation.**

The law defines a "way of necessity" as being an easement arising from an implied grant or implied reservation that is the result of the application of the principle that wherever a party conveys property he conveys whatever is necessary for the beneficial use of that property.

17 *Am. Juris.* (Easements), Section 48, pages 959, 960;
28 *C. J. S.* (Easements), Section 35, pages 695-696.

The rule applies as well to leases as to conveyances of title.

28 *C. J. S.* (Easements), Section 36, pages 699-700.

It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor, or surrounded by his lands, or by his and those of third persons, there arises by implication in favor of the grantee a way of necessity across the premises of the grantor to the highway. To state it in another form, if one grants a piece of land in the midst of his own he thereby impliedly grants a way to reach it.

17 *Am. Juris.* (Eastments, Section 48, pages 960-961;
*Hamby* v. *Templeton*, 221 Ala. 536, 537.

A right of way of necessity over another's lands is distinguished from a right of way by prescription, and cannot ripen into a prescriptive easement while the necessity continues.

28 *C. J. S.* (Easements), Section 18(k), page 674.

There are valuable notes to this Section 18(k), page 674, aptly distinguishing the difference in such ways of necessity and a public way by prescription. The two are founded on entirely different principles of law. The public may use a way of necessity for ingress and egress to the home or place of business of the tenant solely for social or business purposes. This is for the benefit of the tenant, but it does not follow that the general public may enter upon the property for any purpose foreign to any of the incident benefits and rights of the tenant, for general use of such ways by the general public rests entirely with the consent of the dominant owner of the property over which the way of necessity runs. He may exercise this consent by allowing one person or class of persons to use the way and by denying it to another. Or he may deny the use altogether for the general purposes of the public.

The appellant at the time of her arrest was not on the premises for business or social purposes with any of the tenants or by their invitation. That is established by her own mouth by the record (R. 61).

> "Q. What were you doing at the time of your arrest on December 24th?
>
> "A. I was standing on the sidewalk in Chickasaw offering——
>
> "Q. Where on the sidewalk were you standing?
>
> "A. On the outer edge by a post.
>
> "Q. You mean the curb?
>
> "A. By the curb, yes, and I was offering this magazine, I was calling to the passers by as they came by, 'Watchtower, announcing Jehovah's Kingdom,' and this offers the only hope——"

PROPOSITION OF LAW TEN

**The Court below heard this case without a jury and was the trier of the facts. It heard all the evidence and passed upon its weight on the question of the character of the place where appellant was arrested, and determined that the sidewalk and street were located on the private property of the Gulf Shipbuilding Corporation.**

This Court has universally held that it will not review the finding of a jury on facts properly submitted to them if there is any evidence reasonably supporting the verdict.

*First Unitarian Society of Chicago* v. *Faulkner*, 91 U. S. 415, 432;

*Nudd* v. *Burrows, Assignee*, 91 U. S. 426, 439;

*Lincoln* v. *Claflin*, 74 U. S. 132, 136.

Under these authorities it is evident that the finding of the court that appellant was trespassing upon the property of the Gulf Shipbuilding Corporation after warning ends all question in this Court as to the character of the place where appellant was at the time of her arrest.

Under all the facts in the record and the authorities herein cited it is evident that the Alabama statute making it a crime to trespass upon the property of another after warning not to do so is a constitutional exercise of its police powers and that it was not so construed and enforced as to violate appellant's constitutional guarantees. The judgment of the appellate courts below are due to be affirmed.

Respectfully submitted,

WILLIAM N. MCQUEEN,
*Attorney General;*

JOHN O. HARRIS,
*Assistant Attorney General.*

W. W. CALLAHAN,
*Assistant Attorney General,*
*Of Counsel.*

## Certificate

I certify that on this date I sent a typewritten copy of the foregoing brief by mail, postage prepaid, to Hayden Covington at 117 Adams Street, Brooklyn 1, New York.

Dated November 30, 1945.

W. W. CALLAHAN,
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Concurring opinion

# SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1945.

Grace Marsh, Appellant, vs. The State of Alabama. } On Appeal from the Court of Appeals of the State of Alabama.

[January 7, 1946.]

Mr. Justice Black delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from

any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: "This Is Private Property, and Without Written Permission, No Street or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. — Ala. App. —, 21 So. 2d 558. The State Supreme Court denied certiorari. — Ala. —, 21 So. 2d 564, and the case is here on appeal under Section 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. Under our decision in *Lovell* v. *Griffin*, 303 U. S. 444 and others which have followed that case,[1] neither a state nor a municipality can com-

[1] Hague *v.* C. I. O., 307 U. S. 496; Schneider *v.* State, 308 U. S. 147; Thornhill *v.* Alabama, 310 U. S. 88; Cantwell v. Connecticut, 310 U. S. 296; dissent of Chief Justice Stone in Jones *v.* Opelika, 316 U. S. 584, 600, adopted as the opinion of the Court, 319 U. S. 103; Largent *v.* Texas, 318 U. S. 418; Murdock *v.* Pennsylvania, 319 U. S. 105; Follett *v.* McCormick, 321 U. S. 573.

pletely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. *Jamison* v. *Texas*, 318 U. S. 413. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. *Martin* v. *Struthers*, 319 U. S. 141, 146, 147. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms. We do not agree that the corporation's property interests settle the question.[2] The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more

[2] We do not question the State court's determination of the issue of "dedication." That determination means that the corporation could if it so desired, entirely close the sidewalk and the town to the public and is decisive of all questions of state law which depend on the owner's being estopped to reclaim possession of, and the public's holding the title to, or having received an irrevocable easement in, the premises. Demopolis v. Webb, 87 Ala. 659; Hamilton v. Town of Warrior, 215 Ala. 670; Town of Reeds v. Sharp, 218 Ala. 403, 405; Forney v. Calhoun County, 84 Ala. 215; Cloverdale Homes v. Cloverdale, 182 Ala. 419. The "dedication" of a road to the public may also be decisive of whether, under Alabama law, obstructing the road constitutes a crime, Beverly v. State, 28 Ala. App. 451, and whether certain action on or near the road amounts to a tort. Thrasher v. Burr, 202 Ala. 307. But determination of the issue of "dedication" does not decide the question under the Federal Constitution here involved.

do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *N. L. R. B.*, 65 S. Ct. (Adv. Sheets) 982, 985, 987 n. 8. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[3] And, though the issue is not directly analogous to the one before us we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. *Port Richmond Ferry* v. *Hudson County, supra*, 234 U. S. at 326 and cases cited, pp. 328-329; cf. *South Carolina Highway Department* v. *Barnwell Brothers*, 303 U. S. 177. Had the corporation here owned the segment of the four-lane highway which runs parallel to the "business block" and operated the same under a State franchise, doubtless no one would have seriously contended that the corporation's property interest in the highway gave it power to obstruct through traffic or to discriminate against interstate commerce. See *County Commissioners* v. *Chandler*, 96 U. S. 205, 208; *Donovan v. Pennsylvania Co., supra*, 199 U. S. at 294; *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 112, 125. And even had there been no express franchise but mere acquiescence by the State in the corporation's use of its property as a segment of the four-lane highway, operation of all the highway, including the segment owned by the corporation, would still have been performance of a public function and discrimination would certainly have been illegal.[4]

[3] Clark's Ferry Bridge Co. *v.* Public Service Commission of Pennsylvania, 291 U. S. 227; American Toll Bridge Co. *v.* Railroad Commission of California, 307 U. S. 486; Mills et al. *v.* St. Clair County et al., 8 How. 569, 581; Port Richmond Ferry *v.* Hudson County, 234 U. S. 317, 327, 331-332; Covington & L. Turnpike Road Co. *v.* Sanford, 164 U. S. 578; Norfolk & S. Turnpike Co. *v.* Virginia, 225 U. S. 264; Donovan *v.* Pennsylvania Co., 199 U. S. 279, and cases cited on pp. 293-295.

[4] And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in Jones *v.* Opelika, 316 U. S. 584, 600, which later was adopted as the opinion of the Court, 319 U. S. 103, 104, Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate com-

We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a "business block" in the town and a street and sidewalk on that business block. Cf. *Barney* v. *Keokuk*, 94 U. S. 324, 340. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns.[5] These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncen-

merce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause, see Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434, 441, 446-55; McCarroll v. Dixie Lines, 309 U. S. 176, 184-85, it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion." 316 U. S. at 610-11.

[5] In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23. The percentage varied from 9 per cent in Illinois and Indiana and 64 per cent in Kentucky, to almost 80 per cent in West Virginia. U. S. Coal Commission, Report, 1925, Part III, pp. 1467, 1469 summarized in Morris, The Plight of the Coal Miner, Philadelphia 1934, Ch. VI, p. 86. The most recent statistics we found available are in Magnusson, Housing by Employers in the United States, Bureau of Labor Statistics Bulletin No. 263 (Misc. Ser.) p. 11. See also United States Department of Labor, Wage and Hour Division, Data on Pay Roll Deductions, Union Manufacturing Company, Union Point, Georgia, June 1941; Rhyne, Some Southern Cotton Mill Workers and Their Villages, Chapel Hill, 1930 (Study completed under the direction of the Institute for Research in Social Science at the University of North Carolina); Comment, *Urban Redevelopment*, 54 Yale L. J. 116.

sored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[6]

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.[7] As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise the reasons in support of the regulation of those rights." *Schneider* v. *State*, 308 U. S. 147, 161. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[6] As to the suppression of civil liberties in company towns and the need of those who live there for Constitutional protection, see the summary of facts aired before the Senate, Committee on Education and Labor, *Violations of Free Speech and Rights of Labor*, Hearings pursuant to S. Res. 266, summarized in Bowden, *Freedom for Wage Earners*, Annals of The American Academy of Political and Social Science, Nov. 1938, p. 185; Z. Chafee, *The Inquiring Mind* (New York, 1928), pp. 173-74; Pamphlet published in 1923 by the Bituminous Operators' Special Committee under the title *The Company Town*; U. S. Coal Commission, Report, supra, Part III, p. 1331.

[7] Jones *v.* Opelika, *supra*, 316 U. S. at 608; Murdock *v.* Pennsylvania, *supra*, 319 U. S. at 115; Follett *v.* McCormick, *supra*, 321 U. S. at 577.

# SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1945.

George Marsh, Appellant, vs. The State of Alabama. } On Appeal from the Court of Appeals of the State of Alabama.

[January 7, 1946.]

Mr. Justice Frankfurter, concurring.

So long as the views which prevailed in *Jones* v. *Opelika*, 319 U. S. 103, in connection with 316 U. S. 584, 600; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141, express the law of the Constitution, I am unable to find legal significance in the fact that a town in which the Constitutional freedoms of religion and speech are invoked happens to be company-owned. These decisions accorded the purveyors of ideas, religious or otherwise, "a preferred position": *Murdock* v. *Pennsylvania*, *supra* at 115, even to the extent of relieving them from an unhampering and non-discriminatory duty of bearing their share of the cost of maintaining the peace and the other amenities of a civilized society. Constitutional privileges having such a reach ought not to depend upon a State court's notion of the extent of "dedication" of private property to public purposes. Local determinations of such technical matters govern controversies affecting property. But when decisions by State courts involving local matters are so interwoven with the decision of the question of Constitutional rights that one necessarily involves the other, State determination of local questions cannot control the Federal Constitutional right.

A company-owned town gives rise to a net-work of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and to disseminate his ideas. Title to property as defined

by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of "trespass" so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.

Accordingly, as I have already indicated, so long as the scope of the guarantees of the Due Process Clause of the Fourteenth Amendment by absorption of the First remains that which the Court gave to it in the series of cases in the October Term, 1942, the circumstances of the present case seem to me clearly to fall within it. And so I agree with the opinion of the Court, except that portion of it which relies on arguments drawn from the restrictions which the Commerce Clause imposes on State regulation of commerce. It does not seem to me to further constitutional analysis to seek help for the solution of the delicate problems arising under the First Amendment from the very different order of problems which the Commerce Clause presents. The latter involves an accommodation between National and State powers operating in the same field. Where the First Amendment applies, it is a denial of all governmental power in our Federal system.

# SUPREME COURT OF THE UNITED STATES.

No. 114.—October Term, 1945.

Grace Marsh, Appellant, vs. State of Alabama. } On Appeal from the Court of Appeals of the State of Alabama.

[January 7, 1946.]

Mr. Justice Reed, dissenting.

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to exercise freedom of religion, of speech and of the press.[1] It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise.[2] What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. See *Marrone* v. *Washington Jockey Club*, 227 U. S. 633. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner. Compare *Martin* v. *Struthers*, 319 U. S. 141.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established

[1] Lovell v. Griffin, 303 U. S. 444; Hague v. C. I. O., 307 U. S. 496; Schneider v. State, 308 U. S. 147; Thornhill v. Alabama, 310 U. S. 88; Cantwell v. Connecticut, 310 U. S. 296; dissent of Chief Justice Stone in Jones v. Opelika, 316 U. S. 584, 600, adopted as the opinion of the Court, 319 U. S. 103; Jamison v. Texas, 318 U. S. 413; Largent v. Texas, 318 U. S. 418; Murdock v. Pennsylvania, 319 U. S. 105; Martin v. Struthers, 319 U. S. 141; Follett v. McCormick, 321 U. S. 573.

[2] Schenck v. U. S., 249 U. S. 47; Gitlow v. N. Y., 268 U. S. 652; Near v. Minnesota, 283 U. S. 697; Cantwell v. Connecticut, 310 U. S. 296; Chaplinsky v. New Hampshire, 315 U. S. 568; Prince v. Mass., 321 U. S. 158.

by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.[3]

Both Federal and Alabama law permit, so far as we are aware, company towns. By that we mean an area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation. Compare *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, Section 426, Alabama Code 1940 which so far as pertinent reads as follows:

> "Trespass after warning.—Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months."

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment to the Constitution.

continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses. There had been no dedication of the sidewalk to the public use, express or implied. Alabama so decided and we understand that this Court accepts that conclusion. Alabama, also, decided that appellant violated by her activities the above quoted state statute.

The Court calls attention to the fact that the owners of public utilities, bridges, ferries, turnpikes and railroads are subject to state regulation of rates and are forbidden to discriminate against interstate commerce. This is quite true but we doubt if the Court means to imply that the property of these utilities may be utilized, against the companies' wishes for religious exercises of the kind in question.

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation the private property of other citizens to carry out that obligation. Heretofore this Court has sustained the right of employees, under an appropriate statute, protecting full freedom of employee organization, to solicit union membership in nonworking time on the property of an employer and against his express prohibition. This is because the prohibition is an impediment to the right of organization which is protected by a statute which governs a relation between employers and employees if and when the latter are admitted to the employers' premises as licensees. It was recognized in the opinion that the freedom of solicitation was the result of a regulatory statute and was not a Constitutional right. *Republic Aviation Corp.* v. *Labor Board*, 65 S. Ct. 982, 988. In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in *Martin* v. *Struthers*, 319 U. S. 141, an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out at page 147 that after

warning the property owner would be protected from annoyance.[4] The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited, note 10, to show that it would protect the householder, after notice. The right to communicate ideas was expressed by us in *Jamison* v. *Texas*, 318 U. S. 413, 416, as follows: "But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the Constitutional right to express his views in an orderly fashion."

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited purposes. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The CHIEF JUSTICE and MR. JUSTICE BURTON join in this dissent.

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[4] "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs with the homeowner himself." *Martin* v. *Struthers*, 319 U. S. 141, 147-48.